Prime Service, Inc. d/b/a Prime Equipment *and* Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO. Case 32–CA–17101

March 10, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On September 24, 1999, Administrative Law Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Prime Services, Inc. d/b/a Prime Equipment, Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

George Velastegui, Esq., for the General Counsel.
Kathrin E. Sears, Esq. (Gibson, Dunn & Crutcher), of Palo Alto, California, for the Respondent.
Paul D. Supton, Esq. and *Mary M. Leichliter, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld),* of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice of hearing in this matter was held before me in Oakland, California, on May 27 and 28, 1999. The charge was filed on November 12, 1998, by Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO (the Union). On January 22, 1999, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Prime Service, Inc., d/b/a Prime Equipment (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) and on April 22, 1999, following the filing of an amended charge by the Union on April 16, 1999, the Regional Director issued an amended complaint and notice hearing. The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with its corporate office located in Houston, Texas, and with offices and places of business in San Mateo, San Francisco, Sacramento, San Jose, and Berkeley, California, where it is engaged in the rental and sale of construction and industrial equipment. In the course and conduct of its business operations the Respondent annually sells and ships goods and provides services valued in excess of $50,000 directly to customers located outside the State of California. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this proceeding are (1) whether the Respondent is a successor to Clementina, Ltd., an employer with whom the Union maintained a collective-bargaining relationship, and (2) whether the Respondent, as a successor employer, has failed and refused to recognize and bargain with the Union, and furnish the Union with requested bargaining information, in violation of Section 8(a)(1) and (5) of the Act.

B. The Facts

The facts are not in material dispute. On Friday, August 28, 1998,[1] the Respondent took over the operations of Clementina, Ltd. (Clementina), an employer engaged in the maintenance, repair, rental, and sale of construction and industrial equipment at five California locations involved herein: San Mateo, San Francisco, Sacramento, San Jose, and Berkeley.[2] Prior to this date the Respondent interviewed and offered continued employment to each of Clementina's 17 unit employees[3] as well

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 199 F.3d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find no need to rely on the judge's suggestion that the Respondent was a "perfectly clear" successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), inasmuch as this case does not involve the issue of Respondent's obligation to bargain with the Union about the initial terms and conditions of employment for bargaining unit employees.

[1] All dates or time periods herein are within 1998 unless otherwise specified.

[2] The Respondent also apparently acquired and took over two additional California facilities of Clementina at the same time, namely the Stockton store and the Martinez Refinery; these two facilities are not involved herein.

[3] Clementina and the Union had maintained a collective-bargaining relationship since the 1950s, and the most recent contract extended

as, apparently, the remainder of Clementina's hourly employees including truckdrivers. The transition was "seamless" and, as several unit employees testified, they left work on Thursday, August 27, under Clementina's employ, and returned to work at the same location the next morning, August 28, as employees of the Respondent, where they continued performing the identical work, under the same supervisors and managers, using the same tools, trucks, and equipment, and for the same customers, as they had previously performed for Clementina. The only noteworthy difference they could recall was that they began answering the phone as "Prime/Clementina" rather than "Clementina."

Believing that it would have a sufficient work force to commence operations, the Respondent did not interview or advertise for any other applicants prior to August 28. However, within a few days prior to August 28, five employees (four mechanics and the parts clerk) quit Clementina's employ, and announced that they would not be going to work for the Respondent. Thus, on August 28, the Respondent commenced operations with 12 unit employees (8 mechanics, 2 mechanics helpers, 1 mechanic/foreman, and 1 steam cleaner). On August 30, the Respondent began advertising in local newspapers for additional employees.

Two additional unit employees, including Don Southern, the mechanic/foreman, resigned shortly thereafter. Immediately on Southern's departure, one mechanic, Terry Wilmoth, was allegedly assigned managerial responsibilities which had not been part of Southern's prior job as mechanic/foreman, and was therefore, according to the Respondent, no longer a unit employee.[4] Thus, by September 4, the unit employee complement consisted of either 9 or 10 employees (depending on Wilmoth's contested status herein), consisting of 8 (or 9) former Clementina employees and 1 new hire; by September 11, there were 7 (or 8) former Clementina employees and 3 new hires; by September 18, there were 7 (or 8) former Clementina employees and 4 new hires; and by September 25, there were 7 (or 8) former Clementina employees and 8 new hires. The record evidence shows that beginning on September 25, and continuing thereafter, the bargaining unit no longer consisted of a majority of former Clementina employees. On October 28, there were 18 (or 19) unit employees, and on December 31, there were 21 (or 22) unit employees.

Despite the fact that the Respondent, under the name Prime/Clementina, engaged in extensive advertising in local newspapers and at job fairs for both truckdrivers and mechanics or equipment technicians/yardpersons,[5] and even offered current employees a bonus if they would refer qualified applicants, the Respondent was unable to fill the available positions. Until it did so, the Respondent brought in temporary employees from other stores in Oregon, Utah, Texas, and California,[6] at considerable expense: four employees during the week of September 5; four employees during the week of September 12; four employees during the week of September 19; four employees during the week of September 26; two employees during the week of October 3; two employees during the week of October 10; and one employee during the week of October 17. Throughout this period of time, according to Ted Tassone, Respondent's regional operations manager, there were simply not sufficient employees to perform the necessary equipment repairs and maintenance work in an appropriate manner at each of the five locations, and to provide customers with the services that they required.

Tassone also testified, in very abbreviated fashion and without explanation, that at the time of the acquisition the five stores were "imbalanced with regard to personnel," and the Respondent was attempting to "build up" the personnel at the San Francisco and San Mateo stores, and "to some degree" the San Jose store, apparently, "in part at least," because of work being shifted to those stores from other locations, primarily the Stockton store, which the Respondent had apparently also taken over. According to Tassone, the employees at the Stockton store, who are not involved in this proceeding, were employed by a different entity, "Wilkerson," but the store was nevertheless owned by Clementina. Despite this testimony, Tassone, on cross-examination, agreed that the reason the Respondent felt itself "shorthanded" after the acquisition was "because of the resignations which had occurred both before the acquisition and after the acquisition . . . among the mechanics and drivers . . . because [the Respondent] anticipated that the mechanics and drivers were going to accept employment."

Rick McCurry, western division general manager for the Respondent, testified that as of the date of the acquisition "most of the operations were done out of the Stockton facility, and so we had to reorganize all of the things down in the San Francisco, San Mateo, San Jose area . . . get the facilities capable of taking care of the business that was there. We needed a lot of people."

By letter dated August 7, Respondent, by James Turpin, director of human resources, advised the Union that it would be acquiring the assets of Clementina and that it would "be meeting with the employees of Clementina next Tuesday and Wednesday, August 11 and 12, 1998, to discuss the transition to new ownership and introduce the Clementina employees to PRIME Equipment." Special Representative Tom Bailey replied on August 11, stating the Union's position that the Respondent must assume Clementina's contract with the Union, and that, "We look forward to a long and mutually beneficial relationship with Prime, as we have had with Clementina. Please call me to arrange a meeting."

Turpin replied by letter dated August 13, and stated that the Respondent disagreed with the Union's position that the existing contract would continue to remain in force after the acquisition, that, "Although all Clementina employees are being considered for employment with Prime, we have not guaranteed, nor can we guarantee, that all Clementina employees will be offered positions," and that "Prime is, of course, committed to compliance in good faith with all applicable labor laws, includ-

from July 1, 1998, through June 30, 2000. The appropriate unit is described as follows:

> All full-time and regular part-time employees performing work previously performed in the Clementina unit; excluding all other employees, guards, and supervisors as defined in the Act. These employees consist of mechanic (12), mechanic/foreman (1), mechanic helper (2), steam cleaner (1), and parts clerk (1).

[4] Wilmoth's status as a supervisor or unit employee is an issue in this proceeding.

[5] It is clear that equipment technicians and yardpersons are the same as mechanics and mechanics helpers, and that the Respondent was not seeking new classifications of employees.

[6] The Respondent is a nationwide company with some 2750 employees at numerous facilities.

ing those that would be applicable after Prime has consummated this asset acquisition."

Bailey, by letter dated August 14, cautioned the Respondent about changing the terms and conditions of employment of the unit employees without giving the Union an opportunity to negotiate such changes, and suggested that a meeting be held "to discuss a way to make the transition fruitful and mutually productive."

Ronald Katz, formerly contracts manager/attorney for the Union, testified that on either August 25, 26, or 27, he and two other union representatives, Myron Pederson, Oakland district representative, and Joe Galicia, business representative, met with three representatives of the Respondent, namely, Turpin, McCurry, regional manager, and Stanton Eigenbrodt, in-house counsel for the Respondent. This was primarily a get-acquainted meeting and very little of substance was discussed. However, according to Katz, during the meeting Turpin, stated, "That [the Respondent] could set initial terms, but it was their understanding that under the law they would have to recognize us if a majority of the employees were former Clementina employees. And if that was the case, they would do so." It was also stated, according to Katz, that there was a desire by both Clementina and Prime to "have a seamless transition," and that the Respondent was thinking of calling itself "Clementina/Prime" at least initially. Then there was some discussion about who would be doing the anticipated negotiations for the Union and the Respondent and whether the negotiations would take place at the Respondent's Houston office or at some other geographical location more convenient to the union representatives.

While there is some dispute as to what was said during this face-to-face meeting,[7] it is clear that Turpin understood that the Union had made a request for recognition. Thus, in a letter dated September 14, Turpin wrote to Katz as follows:

> I would like to thank you for a most excellent lunch and assure you that I enjoyed meeting Myron Pederson, Joe Galicia and yourself. Mr. Katz, I would like to clarify one point in your letter. We continue to have a disagreement on your position that PRIME is bound to your agreement with Clementina, LTD. I indicated to you PRIME would honor all legal obligations and negotiate with Local No. 3 if legally required to do so.

On September 25, Katz wrote to Turpin stating that as the majority representative of the unit employees it was the Union's desire to begin negotiations. The letter further requests the following information:

> 1. The name, address, phone number and social security number of each employee PRIME has hired to do bargaining unit work who was not included in the list you sent me with your September 14, 1998, letter if there are any.
>
> 2. The job title, job description and rate of pay for each employee in the bargaining unit.
>
> 3. A copy of all work rules applicable to the employees in the bargaining unit that are not included in the employee handbook, if there are any.

Katz testified that he waited "a full week, plus a few days into the next week" and then, having received no response to his letter, phoned Turpin. During this phone call Turpin said, according to Katz, "that things were in a state of flux out there . . . and things were a moving target," and reiterated his prior statement that it was the Respondent's position that it would recognize the Union if the Union represented a majority of the unit employees. Katz, understanding from Turpin's remarks that the majority of the unit employees were indeed former Clementina unit employees, sent Turpin a confirmation letter on October 20, stating:

> This will confirm our recent telephone conversation during which you acknowledged that PRIME recognizes Operating Engineers Local Union No. 3 as the exclusive representative for the employees in the bargaining unit Local No. 3 represented when the employees in the unit were employed by the predecessor employer, Clementina, Ltd. Please let us know when company representatives are available to begin negotiations.

By letter dated October 28, Turpin replied as follows:

> First, we have never orally recognized Local 3 as the collective bargaining agent for mechanics employed by Prime. In fact, as explained below, we have been concerned, and continue to be concerned, about whether it is appropriate for our company to recognize and bargain with Local 3. It is our understanding that we are legally required to do so only if we are a successor employer. We now have hired what we believe is a substantial and representative complement of employees, and it appears that only six of the 18 mechanics currently employed at our San Francisco, Berkeley, San Jose, San Mateo and Sacramento locations were formerly employed by Clementina LTD and represented by Local 3. As you know, a number of Clementina mechanics represented by Local 3 elected no to accept our offers of employment, and still others resigned their employment with Prime after working only short periods of time. Under these circumstances, we do not believe Prime would be considered a successor employer. More importantly, we are concerned that inappropriate or premature recognition could put Prime in the position of violating the rights of Prime employees and the federal labor laws. If you disagree, and would like to provide us with authority which supports some other position, we would be pleased to review it with our advisors. As we have stated from the beginning, Prime is committed to compliance in good faith with applicable labor laws.

Ted Tassone, Regional Operations Manager for Prime and formerly the operations manager for Clementina, testified that when Don Southern, shop foreman at the Berkeley store, resigned his employment on August 31, Jerry Wilmouth not only assumed Southern's position, but moreover was immediately placed in the position of service manager at the Berkeley store. In this capacity Wilmouth was responsible for interfacing with the branch manager regarding the availability of equipment, scheduling the work of some nine store employees, and insuring that the parts manager was ordering the proper parts, and that work orders were being processed correctly. Part of Wilmouth's new responsibilities, according to Tassone, included

[7] Turpin and McCurry, characterized the meeting as simply a sociable affair consisting of the exchange of pleasantries, and were unable to recall whether anything of substance was discussed. I credit the testimony of Katz, as he appeared to have a clear recollection of the meeting, and it is certainly probable that there was at least some discussion of the transition and the Union's bargaining demand, as this was the reason for the meeting.

issuing warnings or reprimands to employees if necessary. However, Tassone did not know whether Wilmouth had ever prepared an employee evaluation, or whether he had ever issued a warning or written warning. Thus, Tassone testified that it is possible Wilmouth may never have given any warnings as, "[Wilmouth] wasn't the kind of guy that would walk around issuing warnings to people. He would work stuff out before it got to that point."

Tassone testified that while his salary negotiations with Wilmouth commenced "relatively soon" after Wilmoth was given his additional responsibilities, nevertheless the appropriate internal company documents for Wilmouth's promotion and increase in salary were not prepared until November, and that it took a while for the papers to be processed. Thus, until sometime in November, Wilmouth was hourly paid and continued to be earning the same wages he had formerly received from Clementina, as were, apparently, all of the other employees who had formerly worked for Clementina.

Tassone, asked what the work situation was like in the five stores immediately after the acquisition, testified: "Well, we were shorthanded due to the resignations. So, we were having difficulty, you know, meeting the requirements of our customers, which is having equipment ready for them to rent, and getting it delivered on time." Thus, according to Tassone, there were customer complaints regarding late deliveries and late service calls, and there was simply not enough equipment available to rent out because of the lack of personnel.

C. Analysis and Conclusions

The record evidence is abundantly clear that the Respondent planned for, anticipated, and expected a "seamless transition" on its assuming and continuing the operations of the five facilities of its predecessor, with no hiatus, no startup transitional period, and no plans for expansion or other operational changes of any significance. A major consideration in accomplishing this goal was the hiring and expected continuation, without interruption, of the employment of 100 percent of the predecessor's work force, including the 17 unit employees represented by the Union. To this end the Respondent notified the Union of its intentions well prior to the takeover, thereafter communicated with the Union and, shortly before August 28, the date of the Respondent's physical takeover of the facilities, met with the Union and assured the union representatives that, as stated in Turpin's September 14 confirmation letter, " I indicated to you PRIME would honor all legal obligations and negotiate with Local No. 3 if legally required to do so."[8] On August 28, the Respondent commenced its operations with 12 of the predecessor's employees who represented each job classification with the exception of the parts clerk.[9]

Under these circumstances, the Respondent became obligated to bargain with the Union even prior to the actual physical takeover, as it was "perfectly clear" that a majority of the Respondent's work force would be made up of the predecessor's employees. *NLRB v. Burns Security. Services,* 406 US 272 (1972); *Turnbull Enterprises*, 259 NLRB 934 (1982).

After August 31, several more of the predecessor's employees quit and the Respondent hired new employees; however, it was not until about September 25 that former employees of the predecessor no longer constituted a majority of the Respondent's unit employees.

I conclude that the Respondent was clearly the successor of Clementina, that the Union made a bargaining demand prior to August 28 which continued thereafter,[10] that the Respondent acknowledged this bargaining demand by assuring the Union that it would honor all legal obligations to bargain, and that this legal obligation to bargain attached no later than August 28 when the Respondent commenced operations with a substantial and representative complement of 12 unit employees,[11] all of whom were former employees of the predecessor. The fact that the Respondent experienced difficulties in taking care of its customers and servicing its equipment because of staffing problems was simply a temporary, unanticipated exigency that, under the circumstances, had no bearing on its duty to recognize and bargain with the Union. In this regard, the Respondent has not demonstrated that it sought to increase its work force at the five locations in order to compensate for the work that had formerly been performed by personnel working out of the Stockton store. The sparse evidence provided by the Respondent, with no underlying details or explanation, and with no testimony regarding just how many additional employees it allegedly believed were needed, is insufficient to warrant such a conclusion. Further, Turpin's October 28 letter to the Union definitively states as follows:

> We now have hired what we believe is a substantial and representative complement of employees, and it appears that only six of the 18 mechanics currently employed at our San Francisco, Berkeley, San Jose, San Mateo and Sacramento locations were formerly employed by Clementina LTD and represented by Local 3.

And, as demonstrated by the evidence presented by the Respondent, the full and complete complement of employees at the five stores, as late as March 31, 1999, ultimately consisted of 22 unit employees. Accordingly, it is clear that the Union's majority on August 28 would have been sufficient to require the Respondent to bargain with it even if the Respondent, at that point, had anticipated a full employee complement of 22 employees.

Thus, the Respondent's startup problems essentially required the substitution of one new hire for each employee who quit, rather than a substantial expansion of the work force that, under the circumstances, would have had the foreseeable and probable consequence of affecting the Union's majority status.[12] Accordingly, contrary to the position of the Respondent, it was not entitled to a "waiting period" to decide whether to recognize the Union at some indeterminate point in the future when, in its estimation, its operations were running satisfactorily. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *Burns Security Services,* supra; *Turnbull Enterprises*, supra; *Delta Carbonate,* 307 NLRB 118 (1992).

[8] As the Respondent has consistently taken the position that it would recognize the Union if legally required to do so, it appears unnecessary to resolve the conflict in testimony regarding whether or not the Respondent, through Turpin, did in fact verbally recognize the Union on about October 6, as alleged "alternatively" in the complaint.

[9] It seems clear that the parts clerk classification was either unnecessary or that the duties of the parts clerk were assumed by mechanics, as the Respondent hired only mechanics thereafter and, insofar as the Respondent's evidence reflects, did not replace the parts clerk.

[10] See *Williams Enterprises*, 301 NLRB 167 (1991).

[11] See *M.U. Industries*, 284 NLRB 388, 392 (1987).

[12] Cf. *Cascade General*, 303 NLRB 656 (1991).

It is the Respondent's position that immediately after Southern, the mechanic/shop foreman at the Berkeley store, quit on August 31, this position was given to Wilmouth, a mechanic, and that Wilmouth was also given additional managerial responsibilities over the employees at the Berkeley shop. Tassone indicated that Wilmouth's new duties included evaluating and issuing warnings to the some nine employees at that location, but testified that he did not know whether Wilmouth had ever, in fact, given employees written warnings. Nor did the Respondent provide evidence that Wilmouth's duties as a mechanic changed or were affected by his new alleged responsibilities or elaborate on or introduce documentary evidence supporting his assertion that Wilmouth evaluated employees. Moreover, according to Tassone, Wilmouth's hourly wage did not change and he continued making the same hourly wage that he had made with Clementina until some indefinite time in November when Wilmouth became a salaried employee. Wilmouth did not testify in this proceeding.

I find that the evidence presented by the Respondent is insufficient to show that Wilmouth was made a supervisor within the meaning of the Act on about September 1, and was therefore no longer a unit employee as of that date. Rather, I find that if Wilmouth did indeed become a supervisor within the meaning of the Act, it was not until some time in November when he apparently became a salaried employee.[13]

On the basis of the foregoing, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act as alleged by failing and refusing to recognize and bargain with the Union as of August 28 and, further, by failing and refusing to provide the Union with the aforementioned requested information which is necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint and as found above.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. The Respondent shall be required to recognize and bargain in good faith with the Union and, if an understanding is reached, to embody such understanding in a collective-bargaining agreement. In addition, the Respondent shall be required to furnish the Union with requested bargaining information in a timely fashion. Also, the Respondent shall be required to post an appropriate notice at each of its stores involved.[14]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Prime Service, Inc. d/b/a Prime Equipment, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union on request.

(b) Failing and refusing to provide the Union with requested bargaining unit information.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action that is necessary to effectuate the purposes of the Act.

(a) Recognize and, on request, bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the five store unit regarding rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, reduce the agreement to writing and abide by its terms. The appropriate unit is as follows:

> All full-time and regular part-time employees, including mechanics, mechanics helpers, parts clerks, yardmen, and technicians, performing work previously performed by the bargaining unit of Prime Equipment's predecessor, who are currently employed at Prime Equipment's San Francisco, San Mateo, San Jose, Sacramento, and Oakland California stores, excluding all other employees, guards, and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, post at each of the aforesaid Respondent's stores copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 12, 1998.

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[13] Under the circumstances, Wilmouth's inclusion or exclusion from the unit does not affect the Union's majority status.

[14] On about May 24, 1999, the Respondent closed its Berkeley facility, after transferring the work and employees from Berkeley to its newly established and nearby Oakland, California store. I find that the Oakland facility simply replaced the Berkeley store, and that in these circumstances the employees at the Oakland location continue to be a part of the appropriate collective-bargaining unit herein.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO as the exclusive representative of our employees in the following collective-bargaining unit:

All full-time and regular part-time employees, including mechanics, mechanics helpers, parts clerks, yardmen, and technicians, performing work previously performed by the bargaining unit of Prime Equipment's predecessor, who are currently employed at Prime Equipment's San Francisco, San Mateo, San Jose, Sacramento, and Oakland California stores, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with requested bargaining information necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to them under Section 7 of the Act.

PRIME SERVICE, INC. D/B/A PRIME QUIPMENT